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LOOH SIONG CHEE v. NUMIX ENGINEERING SDN BHD & ORS AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
AHMAD MAAROP FCJ
B MOHAMED APANDI ALI FCJ
ABU SAMAH NORDIN FCJ
AZAHAR MOHAMED JCA
[CIVIL APPEALS NO: 02(f)-75-10-2012(W), 02(f)-76-10-2012(W), 02(f)-77-10-2012(W) & 02(f)-78-10-2012(W)]
C 6 JULY 2015

COMPANY LAW: *Oppression – Oppression of minority – Applicable test – Concept of fairness – Whether that of commercial fairness – Whether should be applied judicially – Whether test ought to be reconsidered or redefined – Companies Act* D *1965, s. 181*

CIVIL PROCEDURE: *Appeal – Appeal to Federal Court – Company law – Oppression of minority – Applicable test – Test as expounded in Re Kong Thai Sawmill (Miri) Sdn Bhd v. Long Bong Sung – Whether to be reconsidered – Position in England as per s. 994 Companies Act 2006 and O'Neill v. Phillips and* E *Re Saul D Harrison & Sons – Whether compatible with position in Malaysia – Whether court should decline to answer leave question*

The second and third respondents herein ('the respondents') were the directors and shareholders of the first respondent ('Numix'), a company engaged in telecommunications business. Numix was at the material time F operating the business in partnership with Telekom Malaysia, and was the holder of several very valuable telecommunications licences. By some corporate exercises (Shareholders Agreement, Memorandum of Undertaking *et cetera*), which the respondents and Numix had entered with the appellant ('LSC') and LSC's associate companies ('Sejahtera and Jet Allied') – which G culminated in LSC, Sejahtera and Jet Allied making capital investment in a Numix subsidiary ('Magic'), in the telecommunications licences being transferred to Magic and in four million ordinary shares of Magic being allocated to Sejahtera – the respondents discovered that they had been divested of their management of Magic, that Sejahtera had become the H majority shareholder of Magic, and that their own majority shareholding in Magic had been diluted to an insignificant minority. Further, all this was happening when LSC, especially, had not been performing his part of the bargain in the agreements. Following the disputes that arose, and the ensuing suits and counter suits thus filed by the parties, including an oppression I petition filed by the respondents under s. 181 of the Companies Act 1965 ('the Act'), the High Court ruled that LSC and Magic were guilty of oppressive conduct, and in the event, allowed the petition, nullified the allocation of Magic's shares to Sejahtera and ordered for Magic to be wound up. LSC (and Sejahtera) appealed, but the appeals were dismissed.

Principally, it was the view of the Court of Appeal that LSC and one Faris, LSC's nominee in Sejahtera, had, in breach *inter alia* of the Shareholders Agreement, conspired to wrest control of Magic, and that their actions as majority shareholders were oppressive and prejudicial to the rights of the respondents as members of Magic. The appellant (and Sejahtera) applied for and, having obtained leave to appeal, posed the following question to the Federal Court, namely "whether the test under s. 181 of the Companies Act 1965 as expounded in the Privy Council case of *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Long Bong Sung* should be reconsidered in the light of recent developments in England on the law of oppression namely the passage of s. 994 Companies Act 2006 read with *O'Neill v. Phillips* and *Re Saul D Harrison & Sons Plc*".

Before the apex court, the appellant argued that the court ought to reconsider the test under s. 181 as breaches of a shareholders' agreement could not be a basis for a petition, citing in support thereof *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal*. The respondents retorted that the decisions in *O'Neill* and *Re Saul Harrison* had indeed been adopted by our courts, as *inter alia* seen in *Pan-Pacific Construction Ltd v. Ngiu Kee Corporation (M) Bhd*, that there was no novel question of law to be decided, and that the court therefore should decline to answer the leave question.

Held (dismissing appeals; declining to answer question; affirming both the High Court and Court of Appeal)
Per Mohamed Apandi Ali FCJ delivering the judgment of the court:

(1) The so-called new development in English law had been appropriately dealt with by the Federal Court in *Pan-Pacific Construction* and *Jet-Tech Materials*. As was held in *Jet-Tech Materials* "applying what was stated by Lord Hoffman in *O'Neill* and this court in *Pan-Pacific Construction*, we hold the view that the principle as laid down by *Ebrahimi* may be applied to the oppression provision of s. 181 of the Companies Act 1965". It was further rightly held therein that the question of whether it is "just and equitable" to wind up a company is a question of fact. (paras 26, 27, 28, 30 & 33)

(2) The core issue relating to the test under s. 181 here were factual centric in nature. The courts below had made concurrent findings of facts based on the evidence adduced and produced at the joint trial. There was no reason to interfere with the said concurrent findings. (para 31)

(3) Since the question posed to the court was whether the test under s. 181 should be reconsidered, the answer lay in the position of the law and the application of the facts of the case to the law. On the facts of the case, there was nothing to justify a choice of principle between the English cases cited in the question and that of *Re Kong Thai Sawmill*. All had been succinctly considered by this court in *Jet-Tech Materials* and *Pan-Pacific Construction*. (para 32)

(4) In *Pan-Pacific Construction*, the Federal Court had specifically accepted the proposition by Lord Hoffman in *O'Neill* and *Re Saul Harrison* that the concept of fairness should be applied judicially and that fairness would mean "commercial fairness". This was endorsed subsequently by *Jet-Tech Materials*. In short, it is now trite law that the applicable test under s. 181 is the principle test as laid down in *Re Kong Thai Sawmill* and that the basis to determine fairness is that of "commercial fairness" as explained in *O'Neill* and *Re Saul Harrison*. This court has been consistent on this matter and there is no incompatibility between the tests in *Re Kong Thai Sawmill* and the English cases cited in the leave question. (paras 33 & 34)

(5) There was no valid reason either in law or on facts for this court to reconsider the test under s. 181 of the Act. This court, therefore dismissed the appeals and answered the question posed in the negative. (paras 33 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Responden kedua dan ketiga di sini ('responden-responden') adalah pengarah dan pemegang saham dalam syarikat responden pertama ('Numix'), sebuah syarikat yang berkecimpung dalam perniagaan telekomunikasi. Numix pada waktu material menjalankan perniagaannya sebagai rakan kongsi Telekom Malaysia, dan adalah pemegang beberapa lesen telekomunikasi bernilai tinggi. Melalui beberapa langkah korporat (Perjanjian Pemegang Saham, Surat Akujanji dan sebagainya) yang diambil oleh responden-responden dan Numix dengan perayu ('LSC') dan syarikat-syarikat bersekutu LSC ('Sejahtera dan Jet Allied') – yang berakhir dengan LSC, Sejahtera dan Jet Allied membuat suntikan dana dalam sebuah anak syarikat Numix ('Magic'), lesen-lesen telekomunikasi dipindah kepada Magic dan empat juta saham biasa Magic diagih kepada Sejahtera – responden-responden mendapati bahawa mereka telah terlucut kuasa mengurus terhadap Magic, bahawa Sejahtera telah menjadi pemegang saham terbesar Magic, dan bahawa pegangan saham majoriti mereka sendiri di dalam Magic telah mengecut dan menjadi pegangan minoriti yang amat kecil. Lebih dari itu, kesemua ini kelihatan berlaku dalam keadaan di mana LSC terutamanya gagal memenuhi obligasi-obligasinya di bawah perjanjian. Berikutnya, ekoran dari guaman-guaman yang difailkan oleh pihak-pihak, yang termasuk satu petisyen penindasan di bawah s. 181 Akta Syarikat 1965 ('Akta') yang difailkan oleh responden-responden, Mahkamah Tinggi memutuskan bahawa LSC dan Magic bersalah kerana melakukan penindasan, dan oleh itu, telah membenarkan petisyen, membatalkan pengagihan saham kepada Sejahtera dan memerintahkan supaya Magic digulung. LSC (dan Sejahtera) merayu tetapi rayuan mereka ditolak. Pada prinsipnya, adalah menjadi pandangan Mahkamah Rayuan bahawa LSC dan seorang Faris, iaitu nomini LSC di dalam Sejahtera, telah dengan cara yang melanggari perjanjian pemegang saham berpakat untuk merampas penguasaan terhadap Magic, dan bahawa

tindakan mereka selaku pemegang saham majoriti adalah bersifat menindas dan memprejudiskan hak responden-responden sebagai pemegang saham Magic. LSC (dan Sejahtera) membuat permohonan dan setelah diberi kebenaran untuk merayu menonjolkan persoalan berikut kepada Mahkamah Persekutuan, iaitu "sama ada ujian di bawah s. 181 Akta Syarikat 1965 seperti yang dijelaskan oleh Majlis Privy di dalam kes *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Long Bong Sung* harus disemak setelah mengambilkira perkembangan mutakhir undang-undang mengenai penindasan di England dengan termaktubnya s. 994 Akta Syarikat 2006 dibaca bersama dengan *O'Neill v. Phillips* dan *Re Saul D Harrison & Sons Plc*".

Di hadapan mahkamah tertinggi, perayu berhujah bahawa mahkamah harus mengkaji semula ujian di bawah s. 181, kerana pelanggaran perjanjian pemegang saham tidak boleh menjadi asas kepada satu petisyen, sekaligus mengemukakan kes *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal* sebagai sokongan. Responden-responden membalas bahawa, sepertimana yang terserlah dari kes *Pan-Pacific Construction Ltd v. Ngiu Kee Corporation (M) Bhd*, keputusan-keputusan dalam *O'Neill* dan *Re Saul Harrison* sebenarnya telah diikuti oleh mahkamah-mahkamah di Malaysia, bahawa tidak wujud sebarang persoalan undang-undang baharu yang perlu diputuskan, dan bahawa mahkamah, dengan itu, tidak harus menjawab soalan untuk kebenaran di sini.

Diputuskan (menolak rayuan-rayuan; enggan menjawab soalan; mengesahkan kedua-dua Mahkamah Rayuan dan Mahkamah Tinggi)
Oleh Mohamed Apandi Ali HMP menyampaikan penghakiman mahkamah:

(1) Apa yang dipanggil perkembangan baharu dalam undang-undang Inggeris telahpun dikupas oleh Mahkamah Persekutuan dalam *Pan-Pacific Construction* dan *Jet-Tech Materials*. Seperti yang diputuskan dalam *Jet-Tech Materials* "Menggunapakai apa yang dikatakan oleh Lord Hoffman dalam *O'Neill* dan mahkamah ini di dalam *Pan-Pacific Construction*", kami memutuskan bahawa prinsip sepertimana yang dibentang oleh *Ebrahimi* boleh digunapakai kepada peruntukan penindasan s. 181 Akta Syarikat 1965". Ianya juga diputuskan dengan betulnya bahawa persoalan sama ada ianya "adil dan saksama" untuk menggulung sesebuah syarikat adalah satu persoalan fakta.

(2) Isu utama berkaitan ujian di bawah s. 181 di sini adalah berkisar pada persoalan fakta. Berdasarkan keterangan yang dikemukakan dalam perbicaraan bersama, mahkamah-mahkamah di bawah telahpun membuat rumusan-rumuasan fakta yang sama dan selari. Tiada alasan bagi mahkamah ini mengganggu dapatan-dapatan tersebut.

(3) Memandangkan soalan yang dikemukakan kepada mahkamah adalah sama ada ujian di bawah s. 181 perlu dikaji semula, jawapan kepadanya adalah terletak kepada memastikan kedudukan undang-undang sedia ada

dan memadankannya dengan fakta yang berbangkit. Berdasarkan fakta, tiada apapun yang mewajarkan pemilihan antara kes-kes Inggeris yang dibentang dalam soalan dengan *Re Kong Thai Sawmill*. Semuanya sudah dikupas dengan jelas oleh mahkamah ini dalam *Jet-Tech Materials* dan *Pan-Pacific Construction*.

(4) Dalam *Pan-Pacific Construction*, Mahkamah Persekutuan telah secara spesifik menerimapakai proposisi yang dibuat oleh Lord Hoffman dalam *O'Neill* and *Re Saul Harrison* bahawa konsep keadilan haruslah dipakai dengan penuh kehakiman dan bahawa keadilan bermaksud "keadilan komersil". Ini telah disahkan kemudiannya oleh *Jet-Tech Materials*. Dengan kata lain, undang-undang kini adalah jelas bahawa ujian yang terpakai di bawah s. 181 adalah prinsip seperti yang dibentang dalam *Re Kong Thai Sawmill* dan bahawa asas untuk menentukan keadilan tersebut adalah "keadilan komersil" seperti yang dijelaskan dalam *O'Neill* and *Re Saul Harrison*. Mahkamah ini sentiasa konsisten dalam perkara ini dan tidak wujud apa-apa ketakserasian antara ujian-ujian dalam *Re Kong Thai Sawmill* dan yang diputuskan oleh kes-kes Inggeris dalam soalan untuk kebenaran.

(5) Tiada alasan sah sama ada di sisi undang-undang atau fakta untuk menimbang semula ujian di bawah s. 181 Akta. Mahkamah ini dengan itu menolak rayuan-rayuan dan menjawab soalan yang dikemukakan secara negatif.

Case(s) referred to:

Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal [2013] 2 CLJ 277 FC ***(refd)***

O'Neill v. Phillips [1999] 2 BCLC 1 ***(foll)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181(1)(b)
Courts of Judicature Act 1964, s. 96(a)

Companies Act 2006 [UK], s. 994

For the appellants - Gopal Sri Ram (Elaine Yap, Razinah Shaheed Ali, Nimisha Jaya Gobi & Gubachan Singh Pannu with him); M/s Wong & Partners

For the respondents - Cyrus Dass (Reuben Netto, Wong Rhen Yen & Ravenesan S with him); M/s Netto & Co

Reported by Wan Sharif Ahmad

JUDGMENT

Mohamed Apandi Ali FCJ:

[1] There are four appeals by the appellants against the decision of the Court of Appeal that had affirmed the decision of the High Court. The core issue that became the subject-matter of the appeals was the decision that granted an oppression petition under s. 181 of the Companies Act 1965 against the appellants.

Leave To Appeal

[2] Pursuant to s. 96(a) of the Courts of Judicature Act 1964, leave to appeal was granted on 15 October 2012, on a single question, which reads:

> Whether the test under s. 181 of the Companies Act 1965 as expounded by the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung* [1978] 2 MLJ 227 should be reconsidered in the light of recent developments in England on the law of oppression namely the passage of s. 994 Companies Act 2006 read with *O'Neill v. Phillips* [1999] 2 BCLC 1 and *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

Background Facts

[3] The history of the protracted litigation between the parties started when the respondents presented an oppression petition under s. 181 of the Companies Act 1965, on 8 October 2010 against one Magic Telecom Sdn Bhd and the appellants *vide* Petition No. D-26NCVC-100-2010. Consequential to that on 30 December 2010 the appellants filed a civil suit against the respondents *vide* Civil Suit No. 5-NCVC-100-2010. By consent, parties agreed for the oppression petition and the civil suit to be tried together at the High Court.

[4] Magic Telecom Sdn Bhd was the subsidiary company of the first respondent (Numix Engineering Sdn Bhd) and the second respondent (Abdul Razak bin Mohd Noor) and the third respondent (Aishah binti Harun) were shareholders and directors of Numix Engineering Sdn Bhd.

[5] Numix Engineering Sdn Bhd ("Numix") was a vehicle used by Abdul Razak bin Mohd Noor ("Razak") and Aishah binti Harun ("Aishah") to operate on existing telecommunications business referred to as the VSAT Ku Band business, in partnership with Telekom Malaysia since 2008. Numix was a holder of various telecommunication licences known as 'ASP', 'NSP' and 'NFP' licences, since September 2009 and had applied for another licence known as the "Spectrum Approval for 800 MHz" on 15 October 2009. The appellant, Looh Siong Chee ("LSC") came into the picture when Numix was in need of financial assistance. LSC then invested in Magic Telekom Sdn Bhd ("Magic") and on 28 October 2009 the one million shares in Magic were allotted in the following proportions:

Numix	:	650,800 shares
LSC	:	350,000 shares
Abdul Razak bin Mohd Noor ("Razak")	:	100 shares
Aishah binti Harun ("Aishah")	:	100 shares

[6] In January 2010, LSC entered into the following agreements:

(a) Shareholders agreement with Magic and Numix dated 19 January 2010 ("SHA");

(b) Memorandum of undertaking with the respondents dated 19 January 2010 ("MOU"); and

(c) Subscription agreement with Magic and Jet Allied Sdn Bhd ("Jet Allied"), with the latter being the subscriber of redeemable convertible preference shares ("RCPS") dated 22 January 2010 ("SA").

[7] Based upon the above-said agreements, the respective obligations of the parties are as follows:

LSC

(a) To invest one million ringgit for 35% shares;

(b) To procure Jet Allied to subscribe for five million RCPS;

(c) To secure Spectrum approval of 800 MHz on or before 20 April 2010;

(d) To secure NSP and ASP licences for Magic;

(e) To secure additional investment of fifteen million ringgit RCPS for Magic.

Respondents

Upon full execution of LSC's undertakings, Numix agrees:

(a) To transfer all of its assets and KU Band business within nine months from the date of the SHA to Magic;

(b) To transfer the NFP and Spectrum to Magic;

(c) The parties mutually agree to approve a budget of RM1 million for LSC's utilization at his absolute discretion;

(d) To contribute its expertise and know-how for the company's business.

[8] In view of the date-line involved in securing the Spectrum Approval of 800 MHz and the procurement of the additional investment, the trouble began. By April 2010 LSC failed to secure the Spectrum Approval and by end of July 2010 Magic was in the red and in need of funds. To resolve the situation, LSC persuaded Razak and Aishah to issue four million new ordinary shares of Magic as temporary collateral of Sejahtera Saluran Sdn Bhd ("Sejahtera") for granting a loan of RM4 million to Magic. The

temporary collateral was to be redeemed by LSC within 14 days from LSC's capital injection of RM15 million, which was supposed to be injected into Magic on or before 30 July 2010. However on or about 17 August 2010, Sejahtera's company secretary wrote to the respondents informing them that Sejahtera, by using the four million shares allotted to them, was requisitioning an EGM on 8 December 2010 to include two additional directors on Magic's board of directors. This was strongly objected to by the respondents.

[9] As a result, Numix was compelled to file an Originating Summon No. D24-NCC-429-2010 against Sejahtera, LSC and three others to stop the EGM which Sejahtera had proceeded to convene despite the respondents' objections. The High Court granted, *inter alia*, an injunction as prayed in favour of Numix declaring the meeting null and void.

[10] On or about 8 October 2010, the respondents, as petitioners, filed a s. 181 suit against LSC, Sejahtera and Magic (as a nominal defendant) claiming *inter alia*, the following reliefs:

(a) Order to declare the allotment of four million shares in Magic to the appellant (Sejahtera) null and void;

(b) Order to rectify the share register for cancellation of the said shares;

(c) An injunction to restrain LSC and Sejahtera;

(d) Order to buy out or wind up Magic.

[11] On or about 17 December 2010, LSC and Sejahtera filed a Civil Suit No. S-22NCVC-211-2010 against the respondents seeking, *inter alia*, the following reliefs:

(a) A declaration that the SHA and MOU in respect of Magic was valid and enforceable and the same had been breached by the respondents;

(b) An injunction against the respondents from taking any action whatsoever in relation to the assets of Magic that might impede upon the interests of Sejahtera and LSC; and

(c) Specific performance of what was agreed between Sejahtera, LSC and the respondents with regard to all matters pertaining to the transfer of the KU Band business to Magic from the first respondent.

[12] Both s. 181 petition and civil suit were heard together by Justice Anantham Kasinather between 21-24 of January 2011. On 11 April 2011 the learned judge pronounced judgment in favour of the respondents on the allotment of four million shares to be null and void and, accordingly, rectification of the share register. Magic was ordered to be wound up.

[13] Meanwhile, Jet Allied filed Civil Suit No. S-22NCVC-169-2010 against Numix and Magic (strangely enough not against LSC) seeking to declare the SA valid and calling upon Numix and/or Magic to compensate the company for damage for breach of contract because of Numix filing the s. 181 petition. The said civil suit was withdrawn with no order to costs.

Finding By The High Court

[14] The learned trial judge in dealing with the oppression petition made a preliminary finding of fact that the four million ordinary shares issued to Sejahtera was by way of collateral; and such finding was based on the following reasons:

(i) There is no doubt that Numix is holding a very valuable licence. However, the exploitation of this licence requires substantial capital. The evidence reveals that the Petitioners had neither the capital nor the capacity to raise further capital apart from the loan extended by Kuwait Finance prior to they being introduced to LSC;

(ii) In exchange for being allotted 35% of the paid up capital and being made a director of Magic, LSC agreed to raise 20 million by way of RCPS to enable Numix to retire its loan to KF and enable Magic to increase its paid up capital to 20 million. Although no express reference was made to raising 20 million by LSC in the SH, I make a finding to this effect because shortly after the execution of the SH in January 2010, the M&A of Magic was amended to increase its authorized capital to 25 million (Exh. 30 of Enc. 1). Bearing in mind the limited resources of the Petitioners, this increase I hold must have been pursuant to assurances by LSC that he would ensure funding up to 20 million. Indeed, in cross examination, LSC did not deny making the representation but claimed that he was unable to raise funds due to the 2nd Petitioner's demand for a 8% royalty under the collaboration agreement prepared by the 2nd Petitioner. Secondly, LSC reiterated his obligation to raise twenty million by agreeing to provide fifteen million in the letter agreement of 15th July 2010 (tab 3 of Exh. E). This sum together with the five million already provided by Jet Allied justifies the Court's finding of LSC's promise to raise twenty million from the outset of his appointment as a shareholder and director of Numix. Thirdly, by virtue of clause 2.4 of SH, LSC was aware that his obligation was to raise capital by way of RCPS and not ordinary shares. Fourthly, consistent with this understanding, the shares issued to Jet Allied took the form of RCPS. More importantly, the SA included a call option clause whereby LSC had the option to buy the RCPS issued to Jet Allied;

(iii) The allotment and issuance of the four million ordinary shares was clearly contrary to the 'agreed proportions'. Additionally, this allotment was contrary to the provisions of the SH which required all new capital to be in the form of RCPS. At the material time, Numix held the Ku Band licence, the NSF and NFP individual licence and the spectrum approval was pending. All of these licences were of considerable value and Magic was planning a listing once

the licences were transferred to it. Against this background, I reject the evidence of LSC and Faris that the Petitioners agreed to surrender their entitlement to the 'agreed proportions' and simultaneously transfer the licences held by Numix to Sejahtera for the relatively paltry sum of 4 million.

(iv) For LSC to have agreed to raise 4 million within 14 days of 15th July 2010 and retire the KFH loan within 60 days, it is reasonable to assume that he already had arranged to obtain this amount of money when executing the letter agreements of 15th and 16th July 2010. Accordingly, if LSC was genuine in wanting to perform the undertakings contained in these two letters, evidence would have been readily available as to why he was unable to fulfil this undertakings within the agreed deadline. All the more after he had represented to the 2nd Petitioner that the source for the funds was a related family company and the director, his adopted sister, one Ms. Hew San Mei, (see paragraph 36.1 of Enc. 1). Yet, LSC produced no evidence as to why he was unable to meet the time schedule. No documents were produced to explain the reasons behind LSC's inability to fulfil his undertaking. In the absence of such evidence, the irresistible inference is that LSC had no intention from the outset to redeem the 4 million shares and thereby inviting the finding by this court that LSC made the oral representations attributed to him by the 2nd and 3rd Petitioners so as to procedure their consent to the execution of the circular resolution for the issuance of the 4 million shares but with no intention to comply with the same;

(v) Similarly in the case of the undertakings to convert the ordinary shares to RCPS, no evidence was forthcoming from LSC as to why the alternative mode of converting the ordinary shares into RCPS was not attainable within the 14 day period. On the contrary, all the evidence points to LSC and Faris having intentionally avoided the conversion. I opine to this effect because as early as late May 2010, the solicitors for Magic had already prepared and forwarded to Magic a draft subscription agreement (Exh. 47 of Core Bundle). Secondly, the 4 million was deposited with the agreed stakeholders on or before 12th July 2010 and the undertaking contained in the letter agreement provided only on 15th July 2010. As such there was more than ample time for the requisite documentation in the form of the subscription agreement to be completed particularly since the same solicitors had earlier in 20th May 2010 forwarded the draft subscription agreement. No satisfactory explanation was forthcoming for this anomaly. In my judgment, the irresistible inference from this conduct of LSC and Faris is that LSC and Faris having procured the consent of the Petitioners to issue the 4 Million shares pursuant to LSC's oral representations concerning redemption/conversion within 14 days, were not about to now instruct Magic's solicitor to comply with LSC's undertaking in the letter agreement. In other words, LSC had no intention from the outset to honour the oral representation and the undertaking to redeem/convert the 4 million ordinary shares in the letter agreement;

(vi) For the reasons set out in (i) to (v) above, it is my finding that because LSC was anxious that Numix write letters for the transfer of the licences and the novation of the Telekom's contract to Magic, he agreed to the 4 million ordinary shares being issued by way of temporary collateral. Similarly, because the Petitioners were desperately in need of the 4 million, they, in turn, agreed to sign the resolutions for the allotment of the 4 million shares on the oral representations of LSC on the understanding that the representations would be incorporated in the letter agreements to be executed thereafter.

I am persuaded into making this finding by the fact that the oral representations are consistent with the primary interest and concerns of the two parties in July 2010. In this respect, it must be borne in mind that the primary interest of LSC in July 2010 was the transfer of Numix's assets, licences and the novation of the Telekom's contract to Magic (see minutes of project Magic strike of 21st June 2010). The primary concern of the Petitioners, on the other hand, was to keep Magic afloat so that it could be listed without altering the 'agreed proportions'. To keep Magic afloat required substantial injection of funds and LSC had promised to provide up to RM 15 million of the funds. In my judgment, this explains the background to the oral representations attributed to LSC by the Petitioners and why it makes sense for the Petitioners to have signed the resolutions based on the oral representations. The fact that on 15th and 16th July 2010, the Petitioners wrote the letters for the transfer of the licences to Magic and LSC signed the letter agreements of 15th and 16th July 2010 is clearly consistent with the aforesaid background facts. Admittedly, the letter agreements do not include the words 'temporary collateral'. However, that this was the intention of the parties can be easily gleaned from an examination of the letter agreements of 15th and 16th July 2010 and the other letters written between 15th and 20th July 2010.

[15] The learned trial judge also analysed the prejudicial effect to the respondents of the said allotment of the four million ordinary shares to Sejahtera. In his judgment, the learned trial judge wrote:

It is my finding that Magic's single act of allotting 4 million ordinary shares at the instance of LSC, contrary to his oral representations and the undertakings in the letter agreements materially altered the status quo as regards the aforesaid aspects of the contractual arrangement between the Petitioners and LSC, to the prejudice of the Petitioners. The alteration in the status quo took this form:

(i) The 'agreed proportions' as regards the respective shareholdings of Numix and LSC in Magic was destroyed since the 4 million allotment reduced Numix's shareholding and its voting rights to an insignificant 13%;

(ii) The allotment and issuance of 4 million shares was in breach of clauses 2.4 and 3.1 of the SH which required new shares to be issued in the form of RCPS and, in any event, required a new shareholder

to reach agreement with the existing shareholders on the matter of the 'agreed proportions'. In this case, the 4 million shares were ordinary shares and not RCPS and the allottee i.e Sejahtera, not required to reach an agreement with the existing shareholders on the 'agreed proportions';

(iii) The management of Magic was taken out of the hands of the Petitioners in breach of clauses 8.1, 8.4 and 10.1 of the SH in this manner. Sejahtera could now outvote Numix both at the board level and at members' level. LSC and the directors representing Sejahtera were the majority at board level and Sejahtera was by far the majority shareholder; and

(iv) In due course, Sejahtera exercised its rights to the prejudice of the Petitioners. On 17th August 2010, Sejahtera gave notice of its intention to appoint Faris and Azli Bin Abdullah as additional directors of Magic. Notwithstanding objections to their appointment, Sejahtera proceeded to requisition an EGM to seal their appointment. Accordingly, following the appointment of Faris and Azli, Sejahtera assumed control of the affairs of Magic through its 80% shareholding in Magic.

Accordingly, in my judgment, the allotment of the 4 million shares to Sejahtera, effectively transferred control of the management and finances of Magic to LSC and persons associated with him. The Petitioners felt cheated by the manner in which LSC had reduced them from being majority shareholders to insignificant minority shareholders. What more with Faris the CEO and Azli the CRFO both employees of Magic appointed by the Petitioners, now, effectively becoming the Petitioners' 'bosses' with this turn of events. As explained earlier, LSC's justification is that the allotment of the 4 million shares was approved by the Petitioners' and Sejahtera's actions amount to nothing more than exercising its rights as the new majority shareholder of Magic. The finding that the allotment was by way of collateral only effectively destroys LSC's justification.

[16] The learned trial judge then made a finding that there was, on the facts, sufficient evidence of oppression under s. 181(1)(b) of the Companies Act and concluded as follows:

In my judgment, the dilution of the 1st Petitioner's shareholding from 65% to 13%, the circumstances under which Sejahtera became the majority shareholder of Magic, the wresting of control of Magic by the appointment of Faris and Azli based on Sejahtera's alleged shareholding unfairly discriminated against the Petitioners and was clearly prejudicial to their rights as members of Magic based on the terms of the SH, the MOU and the oral representations and undertakings provided by LSC. In my opinion, the allotment of the 4 million ordinary shares by Magic had such a devastating and far reaching prejudicial impact on the rights of the Petitioners as members of Magic, that this single act of Magic affords sufficient proof of oppression so as to justify this Court granting the relief sought by them under section 181(b) of the Companies Act (see *Owen Sim Ling Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at 129).

[17] The learned trial judge also concluded that the best solution, in the circumstances, was the winding-up of Magic, whereby he wrote:

> … the evidence reveals that Magic is devoid of funds and requires substantial funds if it is to continue as a going concern. Having regard to the fact that Numix is, with justification, refusing to transfer its licences based on its reliance of clause 2 of the MOU and bearing in mind that LSC has not been able to obtain spectrum approval till today, in my opinion, no purpose would be served in allowing Magic to continue as a going concern. Accordingly, in my judgment, the most appropriate relief in all the circumstances of this case is to wind-up Magic. I make the following orders: …

Finding By The Court of Appeal

[18] The Court of Appeal made a concurrent finding of fact on the status of the RM4 million ordinary shares allocated to Sejahtera. This can be seen in the judgment of the Court of Appeal, which, *inter alia* reads as follows:

> Before us, it was submitted by learned counsel for the appellants that the RM4 million ordinary shares allocated to the appellant was not temporary in nature. The equity participation in Magic on the basis of 65% between the respondent and LSC cannot be perpetual. Such agreement, if any was a private arrangement between the 1st respondent and LSC. The trial judge overlooked the fact that Sejahtera was not a party to the SH or the MOU and that there was no evidence that the parties intended Sejahtera be bound by the terms of the Share Agreement.
>
> We cannot agree with the above submission.
>
> It was a term of the SH that all new capital was to be raised by way of RCPS and not ordinary shares. Clearly, the allotment and issuance of the 4 million ordinary shares and which was against the "agreed proportions" was contrary to the provisions of the SH. Hence, conditions were imposed on LSC to redeem the RM4 million shares and convert them to RCPS in which he failed.
>
> The conditions were stated in the letters of agreement of 15.07.2010 and 16.07.2010, executed between LSC and the 1st respondent. The letter of agreement of 15.07.2010 bears the caption "redemption of 4 million shares". Paragraph 3 of the letter clearly states that:
>
> > … LSC hereby undertakes that upon his successfully raising Ringgit Malaysia Fifteen Million (RM15,000,000.00) of Redeemable Convertible Preference Shares (RCPS) he will apply to redeem" the Ringgit Malaysia Four Million (RM4,000,000.00 million of ordinary shares. The redemption of the Ringgit Malaysia Four million (RM4,000,000.000) of ordinary shares will be within 14 calendar days or earlier upon finalization of the issuance of the RCPS". Upon completion of which, the revised shareholding of the company will be as reflected in the shareholder's register.
>
> The content of these letters also supported the respondents' case that the allotment and issuance of the 4000 ordinary shares was meant to be temporary collateral.

[19] The Court of Appeal also made various findings of fact and concluded in the same vein as the High court. In its judgment, the Court of Appeal observed as follows:

> On the evidence as disclosed, Sejahtera was the alter ego of LSC which was used to evade contractual obligations imposed on LSC under the SH and MOU. Based on the conduct of LSC and Faris it could be inferred that LSC had no intention from the outset to honour the oral representation and the undertaking to redeem or convert the 4 million shares as prescribed in the letters of agreement.
>
> There were also other evidences pointing to the fact that the release of RM4 million by the stakeholder solicitors to Magic was only made upon issuance of Numix's letters dated 15.07.2010 for novation of the Telekom's contract to Magic and a letter dated 16.07.2010 for the transfer of the NFP licence to Magic. It could be inferred that such arrangements were made as conditions imposed by Sejahtera to becoming a shareholder in Magic.
>
> Section 181(1)(a) of the Act looks to the effect and consequences of the wrong done in determining whether there is oppressive conduct in any given case. (See the Federal Court decision in the case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 2 AMR 2477). The burden is on the respondents to establish that there had been a commercially unfair conduct of LSC and Sejahtera in the operation of Magic. The core consideration was one of equity.
>
> Based on the background of the parties and the evidence presented before the court, Magic was a partnership between Numix and LSC. On the one hand, Numix agreed to contribute the requisite expertise and know-how for the business and prepared to procure the transfer of its KU Bank Business the NFP licence and Spectrum approval to Magic; on the other, LSC agreed to inject the capital into Magic by making arrangements for subscription of shares in Magic and to work towards the approval of the relevant authorities for the transfer of the NFP license and the spectrum approval to Magic.
>
> Nevertheless, as a result of the allotment of the 4000 ordinary shares to Sejahtera, the management of Magic was taken out of the hands of the petitioners in breach of Clauses 8.1, 8.4 and 10.1 of the SH. The petitioner's shareholding in Magic was diluted from 65% to 13%. Sejahtera became the majority shareholder and exercised its control and proceeded to requisition an EGM.
>
> What transpired was that Sejahtera which was effectively controlled by LSC sought to exercise its right as the majority shareholder of Magic to appoint Faris and Azli as directors of Magic. Obviously, with their appointment, LSC together with Faris could out-vote the respondents on any policy matter. The trial judge was correct in his finding that Faris was the nominee of LSC in Sejahtera and that both have conspired to wrest control of Magic. The action of the majority shareholder was clearly prejudicial to the rights of the members of Magic which amounts to oppression.

A It is well settled law that an appellate court will not intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See: *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41; *Watt or Thomas v. Thomas* [1974] AC 484; and *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2004] 6 AMR 781; [2005] 2 MLJ 1).

B

We agree with the findings made by the High Court Judge. His findings were substantiated by contemporaneous documentary evidence and conducts of the parties. The trial judge had painstakingly identified and dealt with the issues exhaustively in each of the two actions before him.

C We find that his findings were supported by cogent reasons. Thus, there is no reason for the Court of Appeal to reverse the findings.

Submissions By Parties

[20] From the single leave question posed in the appeals, the appellants asked for this court to reconsider the test under s. 181 of the Companies Act

D 1965 as expounded in the Privy Council case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227. It was submitted that such test has to be so reconsidered in the light of the new s. 994 of the English Companies Act 2006 and to be read with the English case laws of *O'Neill v. Phillips* [1999]

E 2 BCLC 1 and *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14.

[21] It was submitted by the appellants that the test under s. 181 should be further explained on two aspects, namely:

(a) that the expressions "affairs of the company" under section

F 181(1)(a) and "some act of the company" under section 181(1)(b) must necessarily exclude complaints arising purely out of disputes between the shareholders in their private arrangements;

(b) that the requirement of section 181 must be for the Petitioners to prove either a continuing state of such "affairs of the company" or

G consequences of such "act done or threatened" which has actually injured or can actually injure their rights as members.

Based on the above, it will be shown that the matters complained of by the Petitioners clearly do not amount to oppression within the meaning of section 181.

H **[22]** It was argued by the appellants and relying on the recent Federal Court decision in *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors and Another Appeal* [2013] 2 CLJ 277, that breaches of a shareholders' agreement could not be a basis for a petition under s. 181. Alternatively it was argued that any breach of the SHA or undertaking under

I the MOU could only give rise to a private right by Numix against LSC for rescission and/or damages, but not a drastic remedy under s. 181 that will affect other investors.

[23] The respondents submitted that the thrust of the appellants' argument was not related to the leave question but rather more on the findings of fact by the courts below. On the cross-reference to the *O'Neill v. Phillips* case, it was argued that it has been adopted by our courts, in particular in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721. In short, the respondents submitted that there was no novel question of law to be decided and urged this court to dismiss the appeals by not answering the leave question.

Analysis And Decision Of The Court

[24] From the leave question posed before us, it is clear that it is a request for this court to reconsider the test under s. 181 of the Companies Act 1965 *vis-à-vis* the developments in England, in particular the decisions in *O'Neill v. Philips* and *Re Saul Harrison*.

[25] Before we deal with the leave question it is only appropriate, at the outset to see what s. 181 provides, in terms of its scope and application. Section 181 reads as follows:

> 181. (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground -
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may -
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (e) provide that the company be would up.

A (3) Where an order that the company be wound up is made pursuant to paragraph (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

B **[26]** On the novelty of the question posed that may give rise to the necessity to reconsider the test under s. 181, it is our considered view that the so-called new development in English law has been appropriately dealt with by this court in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor*. This can be seen in the said judgment [2010] 6 CLJ 721 at pp. 734-736, which reads as follows:

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[23] This court in *Qwen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 briefly reviewed the genesis of judicial intervention in the internal affairs of incorporated companies. It said that 'Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies … Two landmark decisions
D settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 All ER 833 … In time it was accepted that what has come to be known as the rule in *Foss v. Harbottle*.

[24] The judgment went on to say that the effect of such legislative
E provisions as s. 210 of English Companies Act 1948 (later s. 459 of the UK Companies Act 1985 and presently s. 994 UK Companies Act 2006) which is similar but not in *pari materia* with s. 181 of the Act which is wider in scope, 'was not to abrogate but to introduce limited exceptions to the rule in *Foss v. Harbottle*'. Thus, it is fair to say that oppression for instance in company law is not a free-floating common law concept but a legislative
F creature.

[25] Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an
G oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

[26] In other words s. 181 permits judicial remedy on four categories of
H conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

[27] It may also be noted that from the wordings of s. 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the
I courts must be based upon rational principles. "The court … has a very wide discretion, but it does no sit under a palm tree"'. (See: *O'Neill v. Philips* [1999] 2 All ER 961).

> [28] In *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC it was explained (Hoffmann LJ [as he then was]) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association … The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole … But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459'.
>
> [29] Thus, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459'. (See: *Re Saul D Harrison & Sons Plc* (*supra*).

[27] It is pertinent to note that the Federal Court also made an observation that s. 994 of the UK Companies Act 2006, although similar to, is not in *pari materia* with our s. 181. And since what is an oppression is created by statute, it would only be fair to compare an apple with another apple and not with an orange.

[28] Richard Malanjum CJSS, who wrote the judgment in *Pan-Pacific Construction*, did make references and in fact followed the English case of *O'Neill v. Philips*, when he wrote as follows:

> [32] And such special relationship between the petitioner and the 2nd respondent entails the application of equitable considerations or constraints as may be derived from the laws of partnership which make it unfair for the 2nd respondent when conducting the affairs of the company to rely on its strict legal powers. Unfairness in this context may be in the form of a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith as for instance, where 'the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed' or 'exchanged' (see *O'Neill v. Philips* (*supra*) before or after they have entered into association.

A [33] Further, it is not 'necessary that such promises should be independently enforceable as a matter of contract'. (See: *O'Neill v. Philips* (*supra*).

[29] Next, there is the latest Federal Court decision in *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co. Ltd & Ors And Another Appeal* B [2013] 2 CLJ 277, where in the judgment delivered by Raus Sharif PCA, *inter alia* (from pp. 296 - 299) it was held as follows:

> [27] A careful look at the provisions of s. 181 of the Malaysian CA and s. 210 of the UK Companies Act will show that both provisions are differently worded. This difference was rightly pointed out by C Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170, when delivering the advice of Privy Council, he said:
>
> > This section can trace its descent from s. 210 of the United Kingdom Companies Act 1948, which was introduced in that year D in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s. 186 of the Australian Companies Act 1951. But s. 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub section (1)(a) it adds disregard of the interests of members, etc. to oppression as a E ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd* [1959] 1 WLR 62 at p. 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of F winding up of the company.
> >
> > Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind-up the company would unfairly prejudice G the 'oppressed' minority. … The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of "oppression" or "disregard" and then leaves to the court a wide discretion as to the relief which it may grant, including the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is H winding-up. That may have been so before 1948 and even after the enactment of s. 210, but is not the case under s. 181.
>
> [28] Based on the case cited above, it could be said that s. 210 of the UK Companies Act 1948 is totally different from s. 181 of the Malaysian CA. Section 210 of the UK Companies Act laid down the requisite "just and equitable" being the condition that has to be fulfilled before a I company could be wound up unlike s. 181 of the Malaysian CA where the words "just and equitable" does not appear. Therefore, at this stage we are of the opinion that the case of *Ebrahimi* does not allow Malaysian

Court to import the concept of "just and equitable" under s. 210 of the UK Companies Act 1948 as a ground for winding up under s. 181 of the Malaysian CA.

[29] However, it must be stressed that *Ebrahimi* was decided under the UK Companies Act 1948, a statute that was repealed by the UK Companies Act 1985. An action for oppression of the minority shareholders has now been provided for under s. 459 of the UK Companies Act 1985 and the remedy spelt out in s. 461 as follows:

> (1) A member of a company may apply to the court by Order on petition for an order under this Part on the ground that the application of company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
>
> (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member of members are to be construed accordingly.

The English Courts had an opportunity to examine s. 459 of the UK Companies Act 1985 in the case of *O'Neill v. Phillips* [1999] 2 All ER 961 ("*O'Neill*"). The House of Lords in *O'Neill* stressed that there must be some breach of equitable principle or an agreement before a breach of a member's legitimate expectation may give rise to a remedy for oppression. The House of Lords had also imported the "just and equitable" principles as enunciated in *Ebrahimi* into the oppression provision of the UK Companies Act 1985. Lord Hoffman in the course of discussing the phrase "unfairly prejudicial" found in s. 461 of the UK Companies Act 1985 concluded that the concept of unfairness in s. 459 was parallel to the concept of "just and equitable" as propounded in *Ebrahimi*. Lord Hoffman said:

> In Section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief, it is clear from the legislative history (which I discussed in *Re Saul D Harrison & Son plc* [1995] 1 BCLC 14 at pages 17 - 20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *Re J E Cade & Sons Ltd* [1992] BCLC 213 at 227 : 'The court … has a very wide discretion, but it does not sit under a palm tree'.
>
> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used …

A … So the context and background are very important.

His approach to the concept of unfairness in section 459 runs parallel to that which your Lordships' House, in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360, adopted in giving content to the concept of 'just and equitable' as a ground for winding up.

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I would apply the same reasoning to the concept of unfairness in section 459.

I should make it clear that the parallel I have drawn between the notion of 'just and equitable' as explained by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd* and the notion of fairness in section 459 does not mean that conduct will not be unfair unless it would have justified an order to wind up the company. There was such a requirement in section 210 of the Companies Act, 1948 but it was not repeated in section 459. As Muimmery J observed in *Re a company (No. 00314 of 19897), ex parte Estate Acquisition and Development Ltd* [1991] BCLC 154 at 161, the grant of one remedy will not necessarily require proof of conduct which would have justified a different remedy.

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Under subsection 459 to 461 the court is not … faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.

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The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair.

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[30] The scope of the oppression petition under s. 181 of the CA was recently discussed by this court in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Ano*r [2010] 6 CLJ 721, where Richard Malanjum CJ (Sabah & Sarawak) held that:

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Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and must eminently be determined according to the facts of the case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interest, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

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It may also be noted from the wording of s. 181 its basic theme is "unfairness". However unfairness does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content

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which it is given must be based upon rational principles. "The Court … has a very wide discretion, but it does not sit under a palm tree". (See: *O'Neil v. Philips* [1999] All ER 961).

[31] Applying what was stated by Lord Hoffman in *O'Neill* and this court in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* (*supra*), we hold the view that the principle laid down by *Ebrahimi* may be applied to the oppression provision of s. 181 of the CA.

[32] However the question of whether or not it is "just and equitable" to wind up a company is a question of fact. In the instant case, it was submitted on behalf of the appellants that the learned trial judge had made a finding of fact on the issue of oppression, and had exercised his discretion correctly and judicially. The Court of Appeal thus was wrong in reversing the findings of fact of the learned trial judge. In all fairness to the judges of the Court of Appeal, they were clearly aware of the limits of their power to interfere with the findings of fact of a trial judge.

[30] As rightly held by this court in *Jet-Tech Materials* (*supra*), the question of whether it is "just and equitable" to wind up a company is a question of fact.

[31] In the appeals before us, from the judgments of the courts below, part of which have been quoted in the earlier parts of this judgment, it is clear that the core issue relating to the test under s. 181 are factual centric in nature. The courts below have made concurrent findings of facts based on the evidence adduced and produced at the joint-trial. Based on the evidence (both oral and documentary) and the circumstances of the case, we see no reason to interfere with the said concurrent findings.

[32] Since the question posed to this court is whether the test under s. 181 should be reconsidered, the answer lies in the position of the law and the application of the facts of the case to the law. On the facts of the case, we find that there is nothing in them to justify a choice of principle between the English case cited in the question and that in *Re Kong Thai Sawmill*. All has been succinctly considered by this court in *Jet-Tech Materials* and *Pan-Pacific Construction*.

Conclusion

[33] For the above reasons, we have no choice, but to answer the question posed in the negative. There is no valid reason, either in law or on the facts, for this court to reconsider the test under s. 181 of the Companies Act. To recapitulate: In *Pan Pacific Construction*, this court had specifically accepted the proposition by Lord Hoffman in *O'Neill v. Philips* and *Re Saul Harrison* that the concept of fairness should be applied judicially and that fairness would mean "commercial fairness". This was endorsed by the later case *Jet-Tech Materials*.

A **[34]** From the above decisions of this court, it is now trite law that the applicable test under s. 181 is the principle as laid down in *Re Kong Thai Sawmill* and that the basis to determine fairness is that of "commercial fairness" as explained in *O'Neill v. Philips* and *Re Saul Harrison*. This court has been consistent on this matter and there is no incompatibility between the
B tests in *Re Kong Thai Sawmill* and the English cases cited in the leave question.

[35] In view of the above, we find that there is no question on the need to "reconsider" the *Re Kong Thai Sawmill* test in the light of the decisions in *O'Neill v. Philips* and *Re Saul Harrison* because both have already been
C adequately considered by this court earlier, as explained above.

[36] As such, we hereby dismiss the appeals with costs.

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